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No. 90-1424

In The

Supreme Court of the United States

October Term, 1990

MANUEL LUJAN, JR., SECRETARY
OF THE INTERIOR,

Petitioner,

v.

DEFENDERS OF WILDLIFE, FRIENDS OF
ANIMALS AND THEIR ENVIRONMENT, AND
THE HUMANE SOCIETY OF THE UNITED STATES,

Respondents.

**Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the findings of fact of the district court, independently reviewed by the United States Court of Appeals for the Eighth Circuit, that respondents have proven their standing to bring this action were clearly erroneous.

2. Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Secretary's 1986 regulation barring interagency consultation on U.S. agency actions that may affect endangered or threatened species abroad violates the plain language of the Endangered Species Act.

PARTIES

The petitioner is the Secretary of the Interior, Manuel Lujan, Jr.

The respondents are Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States.

The respondents have no parent corporations or subsidiaries within the meaning of Supreme Court Rule 29.1.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Defenders of Wildlife, Friends of Animals and Their Environment, and The Humane Society of the United States (collectively "Defenders") submit this brief in opposition to Petitioner Secretary of the Interior ("Secretary") Lujan's request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

This case presents two issues. The first is a straightforward application of this Court's standing precedent to a well-developed factual record. The issue on the merits is whether the Secretary's 1986 regulation which, in a sharp reversal of prior regulations, makes endangered species consultations unavailable to U.S. agencies when those agencies take action which may affect listed species abroad, violates the Endangered Species Act. That act requires the Secretary to engage in consultation with *each* federal agency on *any* action which may affect *any* species, wherever found.

This case presents no issues with regard to foreign affairs. There is nothing in the record below which indicates that the Endangered Species Act consultation process, in conjunction with the many other study processes federal agencies undertake, places any unacceptable burdens on U.S. agency planning. Indeed, the endangered species consultation process has worked successfully domestically for 18 years.

This Court has long given the broad language of the Endangered Species Act its full play. In *TVA v. Hill*, 437 U.S. 153, 184 (1978), this Court identified the congressional purpose in passing the Act:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. *This is reflected not only in the stated policies of the Act, but in literally every section of the statute.*

(Emphasis added.)

This case, like *TVA v. Hill*, involves the commands of Section 7 of the statute, 16 U.S.C. § 1536. There is nothing mysterious or unclear about the scope and impact of that section. As this Court recognized in *TVA v. Hill*:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence" of an endangered species or "*result* in the destruction or modification of habitat of such species. . . . " 16 U.S.C. § 1536. This language admits of no exception.

437 U.S. at 173.

There is nothing extraordinary in the judgment of the court of appeals of which the Secretary seeks review. While the Secretary in his petition denigrates the holding of the Eighth Circuit, that court fully and fairly considered every point now raised by the Secretary. Both in its procedural aspects (standing) and in its substance, the decision of the Eighth Circuit is fully consistent with the decisions of this Court. Further review should be denied.

1. The Act Itself

> "[T]he Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts."
>
> *Defenders of Wildlife v. Lujan*, 911 F.2d at 123.

Section 2 – The opening section of the Act evinces Congress' intent to protect endangered species worldwide. The Act states that the United States has pledged

itself in at least six international treaties to conserve endangered species, and it identifies one of the primary purposes of the Act to be the means to achieve the goals of those treaties and conventions. 16 U.S.C. § 1531(a)(4) and (b). The Act commands all federal agencies to use their authorities in furtherance of its purposes, including the international purposes just recited. 16 U.S.C. §§ 1531(c) and 1536(a)(1).

Section 4 – Under Section 4 of the Act, 16 U.S.C. § 1533,

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species . . . .

16 U.S.C. § 1533(a)(1). Under Section 4(b):

> (1)(A) The Secretary [of the Interior] shall make determinations . . . solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, . . . to protect such species . . . .
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been –
>
> > (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement*; or
> >
> > (ii) identified as in danger of extinction . . . by any State agency or by any agency of a *foreign nation* that is responsible for . . . conservation . . . .

16 U.S.C. §1533(b) (emphasis added). The Secretary's regulations with regard to listing, and the lists of endangered species themselves, may be found at 50 C.F.R. Part 17.

Under Section 4 and the Secretary's published regulations, both domestic species and species whose range is foreign to the United States are listed if endangered or threatened. The Secretary does not contest that as of May 1989, of 1,046 species listed by him as endangered or threatened, 507 were species whose entire range is outside the United States. In addition, there are 71 listed species whose range includes both United States and foreign territory. 911 F.2d at 123. The Secretary has never in this litigation disputed that the Act requires him to list both domestic and foreign endangered species.

Section 7 – Section 7 of the Endangered Species Act is the section that primarily affects federal agencies as they carry out their various statutory mandates. Under Section 7(a)(2), 16 U.S.C. § 1536(a)(2),

> *Each* Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any* action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

(Emphasis added.) After consultation with an affected agency, the Secretary must issue an opinion on the effect of the proposed federal agency action on listed species, and propose an acceptable alternative action if the intended action is found to jeopardize listed species. 16

U.S.C. § 1536(b)(3).[1] As the Eighth Circuit held, Section 7 applies to *each* federal agency undertaking *any* action that may affect *any* listed species. 911 F.2d at 122.

Congress has on numerous occasions indicated its belief that the Section 7 consultation process is the best way for federal agencies to meet the goals of the Endangered Species Act. In the legislative history to the 1979 amendments to the Act, Congress stated, "This consultation process is central to the resolution of conflicts under the act." H.R. Rep. No. 167, 96th Cong., 1st Sess. 5 (1979).

Congress has never during the eighteen year existence of the Act attempted to narrow the scope of consultation or diminish its impact or importance. Congress has steadfastly pointed to "a strong record of timeliness" and "adequacy," and has found that consultation has resulted in the improvement of proposed federal agency actions. H.R. Rep. No. 567, 97th Cong., 2d Sess. 13 (1982). Throughout the process of amending the Act in 1978, Congress remained convinced that, "in many instances[,] good faith consultation between the acting agency and the Fish and Wildlife Service can resolve many endangered species conflicts." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12 (1978). The basic premise of the 1978 amendments was to insure, "that the integrity of the interagency

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[1] Despite oblique references to the contrary in the Secretary's Petition, the consultation duty is mandatory under the terms of the statute on both the Secretary and the agencies proposing to take an action. There is nothing "interpret[ive]," Pet. of Sec'y at 2, "up to the agency concerned," Pet. of Sec'y at 7, or "advisory," Pet. of Sec'y at 11, about either the statute or the regulations thereunder which are at issue in this case.

consultation process designated under section 7 of the act be preserved." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978).

Section 4 requires the listing of foreign endangered species, and Section 7 requires consultation on actions affecting *any* listed species. Nothing in the language of Section 7, nor any other part of the Act, restricts the scope of this consultation duty only to federal agency actions that threaten wildlife within the United States.

Sections 9 and 11 – Like Sections 4 and 7, Section 9, 16 U.S.C. § 1538, and Section 11, 16 U.S.C. § 1540, which concern prohibitions and enforcement of the Act, explicitly govern conduct which harms listed species abroad. Section 9 prohibits the import and export of endangered species, and bars sales of such animals, "in interstate or foreign commerce." 16 U.S.C. § 1538(a)(1)(A) and (F). Section 11 provides for forfeiture of listed species illegally "exported or imported" and provides for condemnation of vessels carrying such poached animals. 16 U.S.C. § 1540(e)(4) and (5).

2. The 1978 Rule

> "After considering . . . extensive commentary, the Secretary concluded that Congress intended the duty [to consult] to extend beyond the United States . . . . "
>
> 911 F.2d at 123.

Shortly after passage of the Act in 1973, a series of consultations among the Department of Interior and other federal agencies began. *See* Defenders' App. I to the Court of Appeals at 5. The purpose of these discussions was to outline the requirements Section 7 imposed on

federal agencies and departments. *See* 43 Fed. Reg. 870 (1978).

On April 22, 1976, the Secretary issued "Guidelines to Assist Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973." *See* Defenders' App. I at 9. After revision, the Secretary issued a Notice of Proposed Rulemaking on January 26, 1977. 42 Fed. Reg. 4868 (1977). Both the Guidelines and the proposed rules explicitly stated that the consultation provisions of Section 7 applied to agency actions that may affect listed species in other countries. Proposed 50 C.F.R. § 17.91, 42 Fed. Reg. at 4871 (1977).

This consultation requirement did not affect foreign nationals or their governments. The consultation requirement applied to federal agencies in the United States when they planned actions (generally in Washington, D.C.) that could have an impact on threatened or endangered species, including those whose range was outside the United States.

The proposed rules received extensive comment and led to final rulemaking on January 4, 1978. 43 Fed. Reg. 870 (1978), codified at 50 C.F.R. Part 402 (the "1978 rule"). The final rulemaking retained the provision of the proposed rule applying Section 7 requirements to federal agency actions that may affect listed species in foreign countries. 50 C.F.R. § 402.02, 43 Fed. Reg. at 874 (1978).[2]

---

[2] Today's Secretary, in his petition, seeks to create the impression that his predecessor was a rogue Secretary who ignored comments from agencies opposing application of the

(Continued on following page)

3. Congressional Adoption Of The 1978 Rule

> "In light of the fact that the 'existing law' at the time of the 1978 amendments included the prior regulation requiring consultation on foreign projects, we believe that the [Conference Report] language provides strong evidence of the conference committee's tacit approval of the prior regulation."
>
> 911 F.2d at 124.

Congress amended the Act in 1978. Pub. L. No. 95-632, § 3, 92 Stat. 3751 (1978). Congress enacted the new Section 7(a) (the current form of the consultation requirement) with the specific intention of restating existing law on Section 7 consultation requirements, including the regulations comprising the 1978 rule. The conference committee stated:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . *The Conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most*

(Continued from previous page)

Section 7 consultation duty to agency actions which could affect endangered species overseas. Pet. of Sec'y at 3. In fact, and as recognized by the Eighth Circuit, 911 F.2d at 123, the Secretary's own lawyers at the Interior Department's Solicitor's Office, and other agencies including the President's Council on Environmental Quality, and the National Oceanic and Atmospheric Administration, all concluded that Section 7 applied to agency actions which may affect listed species abroad.

> *Federal agencies and have received substantial judicial interpretation.*

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). Congress thereby affirmed the correctness of the interpretation given to Section 7 in the 1978 rule. The district court, Chief Judge Alsop, found this statement in the Conference Report to be, "the one piece of legislative history helpful to the resolution of the present controversy." 707 F. Supp. at 1085.

4. The Secretary's About-Face

> "Despite this evidence of congressional intent, in 1983, the Secretary issued a notice of proposed rulemaking to revise the [1978 rule]."
>
> 911 F.2d at 124.

On June 29, 1983, the Secretary published a Notice of Proposed Rulemaking to revise the 1978 rule. 48 Fed. Reg. 29990 (1983). The new proposed rule cut back the scope of Section 7 consultation requirements to actions proposed for the United States, its territorial waters, and the outer continental shelf. The term "action" contained in Section 7 ("Federal agency action") was defined in the 1983 proposed rulemaking to include *only* agency actions within the United States, its territorial waters, or the outer continental shelf. No legislative history or dictionary definition was cited to support this odd definitional tack.

Over comments opposing his action, on June 3, 1986, the Secretary published a final rule revising the 1978 rule. 50 C.F.R. Part 402, 51 Fed. Reg. 19926 (1986) (the "1986

rule"). In response to the comments on the proposed rule, the Secretary retained that portion of the 1978 rule applying Section 7 to federal agency actions affecting species located on the high seas. The 1986 rule rescinded that portion of the 1978 rule which applied the consultation requirements of Section 7 to federal agency actions that may affect species in foreign nations. The definition of "action" in the 1986 rule purported to limit the applicability of Section 7's consultation requirement to agency actions occurring in the United States or on the high seas. 50 C.F.R. § 402.02. This action by the Secretary represented a 180 degree turnabout from prior final agency policy.

Although consultations on federal agency actions affecting species in foreign lands have not been conducted under the 1986 rule, the Secretary continues to list endangered species whose range is outside of the United States.

5. Congressional Reaction To The Secretary's 1986 Rule

Congress has chided the Secretary about the 1986 rule. In the report of the House Committee on Appropriations accompanying the 1987 appropriations bill for the Department of the Interior, the following funding recommendation is made:

> The Committee also expects the [U.S. Fish and Wildlife] Service to continue to provide consultation on endangered species to United States agencies dispensing foreign assistance.

H.R. Rep. No. 714, 99th Cong., 2d Sess. 19 (1986). *See also* H.R. Rep. No. 171, 100th Cong., 1st Sess. 15 (1987); H.R. Rep. No. 713, 100th Cong., 2d Sess. 15 (1988). In the Senate, the Committee on Environment and Public Works, in reporting out the Endangered Species Act Amendments of 1987 (S. 675), stated:

> To the extent that [the 1986] regulations attempt to restrict the Act's requirements that each federal agency consult with the Secretary to ensure that its actions are not likely to jeopardize the continued existence and recovery of any listed species, the regulations have no statutory basis, are contrary to congressional intent, and are contrary to the law.

S. Rep. No. 240, 100th Cong., 1st Sess. 6-7 (1988). *See also* 134 Cong. Rec. S9758 (daily ed. July 25, 1988) (statement of Sen. Chafee, floor manager of S. 675). It is clear that the Congress shares none of the Secretary's apprehension about application of the Endangered Species Act to federal agency actions that may affect listed species abroad.

6. The Litigation

Defenders filed a complaint for declaratory and injunctive relief on August 27, 1986, alleging, *inter alia*, that the 1986 rule violated the Endangered Species Act. The jurisdictional basis for the Endangered Species Act claims was the citizen suit provision of that Act, 16 U.S.C. § 1540(g). First Amended Complaint at ¶1.

On February 25, 1987, the United States District Court for the District of Minnesota ordered the action dismissed, finding that Defenders lacked standing. *Defenders of Wildlife v. Hodel*, 658 F. Supp. 43 (D. Minn.

1987). In an opinion dated July 8, 1988, the United States Court of Appeals for the Eighth Circuit held that Defenders did have standing – that it had alleged substantive and procedural injuries fairly traceable to the Secretary's 1986 rule and redressable by the relief sought. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988) (*"Defenders I"*). The substantive injury was the threat of an increased rate of extinction of endangered species absent consultation; the procedural injury was the Secretary's refusal to carry out the mandatory Section 7 consultations. The Secretary petitioned the Eighth Circuit for rehearing *en banc*, which was denied on October 14, 1988. The Secretary failed to seek further review.

On remand, Defenders moved for summary judgment on the merits of its claims. The Secretary deposed several members of Defenders and himself moved for summary judgment, though again on the issue of standing. After review of this beefed-up factual record, the district court found no genuine factual issue as to standing and denied the Secretary's motion. The district court then granted Defenders' motion for summary judgment on its Endangered Species Act claims. *Defenders of Wildlife v. Hodel*, 707 F. Supp. 1082 (D. Minn. 1989). The district court ordered the Secretary to revoke and rescind the 1986 regulation, and to publish regulations "affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found." 707 F. Supp. at 1086.

The Eighth Circuit affirmed the order of the district court in all respects. *Defenders of Wildlife v. Lujan*, 911 F.2d

117 (8th Cir. 1990) (*"Defenders II"*).[3] On standing, the Eighth Circuit conducted its own review of the fact-laden record before it, and concluded that Defenders had proven standing under all applicable precedents of this Court, including *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990). On the merits, the Eighth Circuit concluded based upon the plain language of the statute that the Secretary's Section 7 consultation duty extended to agency actions that may affect listed species abroad. The Secretary's petition for rehearing *en banc* was denied on December 10, 1990.

SUMMARY OF ARGUMENT

On standing, the fact-laden record before the Court contains testimony by Defenders' members both by affidavit and by subsequent deposition that they have visited sites of federally funded development projects overseas for the purpose of viewing and studying endangered species. Those projects have not been, and under the Secretary's 1986 rule never will be, subject to Section 7

[3] The Secretary's claim in his Petition at 19 n.6 that Defenders has not prevailed under the Endangered Species Act, 16 U.S.C. § 1540(g), but rather that, "This suit instead is one challenging agency action (the regulation) under the APA," is sophistic. The Secretary has plainly violated Section 7 of the Endangered Species Act by failing to provide the required consultation on *"any"* federal action which may affect *"any"* listed species. The district court and the court of appeals properly decided this case on its procedural (standing) and substantive aspects under the Endangered Species Act and that Act's citizen suit provision.

consultations. Defenders' members have testified about how they will be harmed by the threatened increased rate of extinction of these species if these projects go forward without consultation. Congress created the consultation process specifically to remedy this harm.

The Secretary's arguments on the merits demonstrate only that the red herring is not an endangered species. This Court has already declared that, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *TVA v. Hill*, 437 U.S. at 173. Taking the plain meaning of Sections 4 and 7 in context with the international concerns of the rest of the Act, the Eighth Circuit correctly concluded that the language of the statute showed Congress' intent to apply Section 7 to agency actions affecting protected species abroad.

ARGUMENT

I. DEFENDERS HAS STANDING

This case involves a routine challenge to the most classic "agency action" there is – a duly promulgated final rule. Environmental group plaintiffs have sued on behalf of members who have visited project sites adversely affected by the rule for the purpose of studying endangered species; those same projects have not been subjected to statutorily required environmental review, harming plaintiffs' interests. Ever since *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), such facts have sufficed to support standing.

Article III of the constitution requires that to possess standing a plaintiff show an injury in fact, traceable to the complained-of action, redressable by the relief sought. In the Endangered Species Act, 16 U.S.C. § 1540(g), Congress has provided that, "any person may commence a civil suit . . . to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this Act . . . . " Congress thereby removed any prudential barriers to standing in this case, and indicated its intent that the Endangered Species Act be vigorously enforced, even against the United States government.

In *Defenders II*, on review of cross-motions for summary judgment, the Eighth Circuit had before it a fully developed factual record on the standing issue. The Eighth Circuit also carefully applied this Court's most recent case relating to standing in the context of motions for summary judgment, *Lujan v. NWF*, on which the Secretary relies in his Petition. The Eighth Circuit concluded, "Defenders had met its burden of proving standing at the summary judgment phase of the litigation." 911 F.2d at 120. The factual findings of the district court on standing, revisited by the Eighth Circuit, are not clearly erroneous.

Defenders has gone far beyond the steps required in any Supreme Court case to prove standing. Defenders in its amended complaint alleged, and in affidavits submitted to the district court prior to *Defenders I* provided testimony that, Defenders' members have:

- Visited sites where American-funded projects are occurring and may affect protected species;

- Studied, observed and enjoyed endangered and threatened species and their habitats for both professional and personal reasons;

- Worked both vocationally and avocationally to protect these animals; and

- Intend to return to the affected sites to study, observe, and enjoy the animals and their habitat, if any remain.

Following *Defenders I* the Secretary deposed eight of Defenders' affiants, whose depositions are a part of the record. On its own review of this developed record, the *Defenders II* panel agreed with the district court and concluded that, " . . . Defenders' members established that they had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by specific agency projects." 911 F.2d at 120.

Defenders' member Amy Skilbred is a wildlife biologist. She has travelled to Sri Lanka specifically to seek endangered wildlife and to study wildlife habitat at the site of the United States Agency for International Development's ("AID") Mahaweli Dam project, where listed endangered species exist. Deposition of Amy Skilbred at 38-39, 42-43, Addendum to Defenders' Brief to the Eighth Circuit ("Add.") at 5-6, Defenders' App. I at 264-265. She determined she had been at the specific site of the Mahaweli project through review of federal documents and maps. *Id.* At her deposition Ms. Skilbred succinctly illustrated the nature of the harm to her interests if the Mahaweli project goes forward without the consultation which Congress has declared to be "central to the resolution of conflicts under the Act":

> Q: And for what purpose would you like to go back to Sri Lanka to visit the Mahaweli Project?
>
> A: *I'd rather go back to visit the wildlife that live in the area* of the Mahaweli Project.

Deposition of Amy Skilbred at 46, Defenders' Add. at 7, Defenders' App. I at 266 (emphasis added). She testified as to her fixed intention to return to the site. Deposition of Amy Skilbred at 46, Defenders' Add. at 7, Defenders' App. I at 266. The specific date of her return is irrelevant – if the endangered species are eradicated by the project, they will be gone for the rest of time.

Ms. Skilbred is a wildlife professional, who knows the risks to her interests of proceeding with a project like Mahaweli without a Section 7 consultation:

> Q: Do you have any knowledge of the impact of the project on the elephant and leopard that you mentioned and the other endangered species? . . .
>
> A: Yes. The effect would be largely on habitat. This is critical or important habitat for those species, especially the large species like the elephant and lion, which need a fair amount of undisturbed habitat. So the effect, the end effect may be that it diminishes the number of endangered species.

Deposition of Amy Skilbred at 43, Defenders' App. I at 266.

Former Defenders of Wildlife President Joyce Kelly testified by affidavit that she had visited the site of the Bureau of Reclamation's Aswan High Dam rehabilitation project to observe the habitat of the endangered Nile crocodile, and to seek the reptile itself, and that she

would be harmed by that U.S. agency project. The Secretary never rebutted Ms. Kelly's testimony and it stands as offered.

The record before the court of appeals demonstrated that Defenders' members have a personal interest in Section 7 consultations being performed on federal agency actions which may affect listed species overseas.

In *Defenders II* the Secretary chose not to argue the issues of traceability and redressability. He now seeks to inject those issues into the litigation in his Petition to this Court. Ironically, the Secretary's own Petition undermines his causation argument, as he describes at length the Section 7 consultation process and the requirements it imposes on federal agencies to insure that their actions do not jeopardize listed species. *See* Pet. of Sec'y at 20-21 and n.7.

In order to demonstrate traceability and redressability, plaintiffs seeking to force a governmental entity to perform a statutorily required study need not prove what the study's outcome will be – such a requirement would illogically force the plaintiff to perform the very study the government has been derelict in conducting. *City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986). There is no split among the circuits on this question.

In the case of Section 7 consultations, the precise harm that a project will cause cannot be known with certainty until the consultation process occurs. If, as the Secretary wishes, the courts withhold judicial review of

agency action until the action has jeopardized an endangered species, it will be too late – the wildlife will be gone forever.

In *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), this Court held that:

> [A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.

(Emphasis in original; citations omitted.) In *TVA v. Hill*, 437 U.S. at 178, this Court held that the purpose of the Endangered Species Act was, "[t]he institutionalization of . . . caution," quoting H.R. Rep. No. 412, 93rd Cong., 1st Sess. 4-5 (1973). Congress created the Section 7 process to provide this institutionalized caution. In *Defenders I* the Eighth Circuit held that Defenders had alleged a threat of an increased rate of extinction of endangered species absent consultation, and a procedural harm from the failure of the Secretary to conduct Section 7 consultations. 851 F.2d at 1039-1041. In *Defenders II*, on review of a factually developed record, the Eighth Circuit concluded that Defenders had proven these harms. 911 F.2d at 120.[4] Compelling the Secretary to conduct Section 7 consultations on agency actions which may affect endangered or threatened species abroad will provide the element of

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[4] The argument of the Secretary that the Eighth Circuit has read a supposed "geographical nexus" requirement out of the law on procedural injury, Pet. of Sec'y at 9, is irrelevant in light of the proof that Defenders' members have indeed visited sites of federally funded development projects for the purpose of observing endangered animals and their habitat.

"institutionalized caution" that will redress Defenders' injury stemming from the threat of an increased rate of extinction of listed species, and will (obviously) redress the procedural harm which Defenders has suffered.[5] Defenders has standing.

II. SECTION 7 APPLIES TO AGENCY ACTIONS WHICH MAY AFFECT ENDANGERED SPECIES ABROAD

The court of appeals properly held that the plain language of the Endangered Species Act demonstrated Congress' intent that Section 7 consultations be performed on agency actions which may affect listed species abroad. 911 F.2d at 123. In this situation the court of appeals owed no deference to the Secretary's unlawful construction of the Act. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984).

The key to this case is the relationship of the Section 4 listing requirement to the Section 7 consultation duty. Section 4 requires the Secretary to list foreign endangered

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[5] The Secretary's contention in his Petition at 15 that federal action agencies could simply ignore the results of a Section 7 consultation and proceed with an unmodified project which would jeopardize an endangered or threatened species is wrong. To the extent that the appellate cases cited by the Secretary imply that conclusion, *TVA v. Hill* has clearly made such decisions bad law. In *TVA v. Hill*, 437 U.S. at 186 n.31, this Court stated that nothing in the Act's legislative history supported such a conclusion, and that an agency which ignored the results of a Section 7 consultation would be susceptible to an action for injunctive relief brought either by the Secretary or by any person under 16 U.S.C. § 1540(g).

species, and he does so. Almost half of all species listed pursuant to Section 4 have been foreign to the United States. *See* 50 C.F.R. § 17.11. Section 7 requires "*[e]ach*" federal agency to consult on "*any* action" to insure that such action does not jeopardize "*any* endangered species or threatened species." By Section 4 of the Act, endangered and threatened species specifically include species whose range is outside the United States. The Act, on its face, leaves no room for argument. *See TVA v. Hill*, 437 U.S. at 173, and 184 n.29. As the district court held:

> The language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas, therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.

707 F. Supp. at 1084-85 (emphasis by the court). Congress directed the Secretary to list species within and without the United States and to consult on "any actions" affecting "any" such species.

But the Eighth Circuit did not stop with the plain language of Section 7. It fully considered the argument of the Secretary that he possessed the discretion to disobey plain statutory language:

> It cannot be denied that Congress has chosen expansive language which admits to no exceptions. . . . We recognize, however, that the use of all-inclusive language in this particular section of the Act is not determinative of the issue. *See Foley Bros. v. Filardo*, 336 U.S. 281, 287-88 (1949); *United States v. Mitchell*, 553 F.2d 996, 1003-04

> (5th Cir. 1977). We must search the Act further for clear expression of congressional intent.

911 F.2d at 122. The court of appeals then analyzed the balance of the statute to ascertain the commitment Congress made to worldwide preservation of endangered species when it passed the Endangered Species Act.

The Eighth Circuit also reviewed the legislative history of the 1978 amendments to the Act, in which the Conference Committee indicated that Congress desired to retain existing law on Section 7 consultations (including the Secretary's earlier regulatory ruling that Section 7 *did* apply to federal agency actions affecting species abroad) because regulations governing the consultation process were by then well known to federal agencies. 911 F.2d at 124. Upon careful review of the administrative process leading to the 1978 rule, the court of appeals concluded:

> In light of the extensive commentary made by numerous agencies on the issue, however, we believe that it is highly unlikely that Congress was unaware of this state of the law.

911 F.2d at 124. This legislative history was not necessary to the Eighth Circuit's decision, but does provide useful confirmation that Section 7 means what it says.[6]

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[6] The Secretary's citations to the statements of individual legislators on the supposed domestic orientation of Section 7, Pet. of Sec'y at 27-28 and nn.11 and 12, are of little consequence in light of the language of the Conference Report, the most authoritative source of legislative history after the statute itself. *See, e.g., Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981). In any event there are plenty of floor statements recognizing the worldwide scope of the Endangered Species Act.

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The statutory arguments offered by the Secretary in support of his 1986 rule were all thoroughly considered and disposed of by the Eighth Circuit. The overriding problem with the Secretary's statutory arguments, as the Eighth Circuit recognized, 911 F.2d at 123, is that they wrongly attempt to compartmentalize a statute which must be read as a whole. *TVA v. Hill*, 437 U.S. at 184.

- **The Critical Habitat Designation Clause Of Section 4 Does Not Demonstrate A Domestic Intent For Section 7 Consultations.**

Whether or not critical habitat is designated in foreign countries has no bearing on this case. The issues of critical habitat designation and consultation are statutorily distinct, and the Secretary misanalyzes the statute when he argues otherwise. *See* Pet. of Sec'y at 2-3, 23. The Secretary's discussion of critical habitat ignores Section 4, the section of the Act under which critical habitat is actually designated (not Section 7, as the Secretary would have the Court believe). Under Section 4(b)(1), 16 U.S.C. § 1533(b)(1), the Secretary is to list species as endangered or threatened, "solely on the basis of the best scientific and commercial data available to him . . . after taking into account those efforts, if any, being made by any . . . foreign nation . . . to protect such species . . . within any area under its jurisdiction." The statute creates a

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See, e.g., 124 Cong. Rec. H38126 (daily ed. Oct. 14, 1978) (Rep. Dingell); *id.* at H38132 (Rep. Murphy); 119 Cong. Rec. H30165 (daily ed. Sept. 18, 1973) (Rep. Grover); 124 Cong. Rec. S21143 (daily ed. July 17, 1978) (Sen. Nelson).

different standard in Section 4(b)(2), 16 U.S.C. § 1533(b)(2), for critical habitat designation, wherein "economic impact[s], and any other relevant impact[s]," of designating an area as critical habitat may be considered. Section 4(b)(2) contains no reference at all to "foreign nations."

Because critical habitat designation and species listing occur under different statutory standards in Section 4, the issue of whether or not the Secretary should designate critical habitat abroad is analytically distinct. In the past, the Secretary has recognized this distinction. *See* Gov't C.A. App. at 21; 42 Fed. Reg. at 4869.

- **The Section 7 Exemption Procedure Demonstrates An International Intent For Consultations.**

Nothing in the exemption provisions of Section 7(e)-(p), 16 U.S.C. § 1536(e)-(p), implies a domestic limitation to the consultation provision of Section 7(a)(2). The statutory language of the exemption clauses provides that, " . . . the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption . . . . " 16 U.S.C. § 1536(g)(1); (g)(2)(B)(1)(i) (emphasis added). The "Governor . . . *if any*" language clearly envisions the statute encompassing agency actions that would not affect any state's governor, such as those affecting wildlife abroad. The Secretary's argument that the *if any* "phrase may simply assume coverage of activities on the high seas . . . . " Pet. of Sec'y at 24 n.9, strains unnecessarily the statutory language. The statutory language should be given its ordinary meaning – the statute covers all those agency actions that affect governors, and

all those that do not, including actions affecting listed species in other nations.

- **The Eighth Circuit's Decision Does Not Infringe Foreign Sovereignty.**

The Secretary threads the argument throughout his Petition that Congress couldn't really have meant what it said in the statute; that requiring Section 7 consultations on agency actions that may affect listed species abroad would be too great an imposition on foreign nations' sovereignty to countenance. *See, e.g.*, Pet. of Sec'y at 3, 10, 12, 22-23, 25, 29. One of the most intelligent responses to this argument was written over a dozen years ago by the Secretary's own lawyer, the Interior Solicitor, in connection with the 1978 rule.

The comments of the Interior Department's Solicitor's Office on the proposed 1978 rule were particularly well-reasoned and detailed in explaining why, based upon, "the language of the section, the wording of other portions of the Act, and the Act's legislative history," Gov't C.A. App. at 22, Section 7 required the Secretary to consult on agency actions that could affect listed species abroad. The Interior Solicitor considered the argument,

> that using the jeopardy clause [Section 7(a)(2)] to curb the overseas activities of federal agencies would infringe on the sovereignty of foreign countries by imposing on them the environmental policies of the United States . . . .

The Solicitor responded:

> With regard to infringing on Foreign sovereignty, section 7's jeopardy clause is no greater imposition of U.S. environmental policy than

> section 9's prohibitions [16 U.S.C. § 1538], or than section 11's provision for forfeiting foreign species and products if they are seized by U.S. agents. *It should be remembered that the jeopardy clause actually applies only to U.S. agencies . . . .*

Gov't C.A. App. at 24-25 (emphasis added).

The Eighth Circuit's conclusion on this issue of purported intrusion on other nations' sovereignty was well-reasoned and correct:

> We note initially that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

911 F.2d at 125. Because Congress in Section 7 merely regulated the actions of its creatures the federal agencies, generic international law cases such as *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), Pet. of Sec'y at 22, do not apply.

- **The Presumption Against Extraterritorial Application Of Statutes Does Not Govern This Action.**

The Secretary relies heavily on the argument that, absent evidence of contrary congressional intent, there is a presumption of statutory construction against extraterritorial application of statutes.[7] *Foley Bros., Inc. v. Filardo,*

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[7] Defenders has throughout this litigation maintained that the whole question of "extraterritoriality" was the biggest of

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336 U.S. at 285. In *EEOC v. Arabian American Oil Co.*, 59 U.S.L.W. 4225, 4226 (U.S. Mar. 26, 1991), this Court recently stated that, "In applying this rule of construction, we look to see whether 'language in the [relevant act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control,' " (quoting *Foley Bros.*). The Eighth Circuit properly applied this standard – it examined the Endangered Species Act and found abundant evidence that Congress intended the Section 7 consultation process to apply to agency actions which may affect listed species abroad. The legislative history supported this conclusion.

In the Act, when Congress wanted to distinguish among the United States, the high seas, and foreign nations, as it did in Section 9's taking provisions, 16 U.S.C. § 1538(a)(1)(B) and (C), it did so. As Chief Judge Alsop noted:

> Section [7]'s all-inclusive language, when contrasted with the discriminatory language of section [9], cannot be considered sloppiness on the part of Congress but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.

707 F. Supp. at 1085. Statutory presumptions cannot overcome the clear requirements of the Endangered Species

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the Secretary's many red herring. Section 7 applies to the planning activities of U.S. agencies. There is no issue here of applying U.S. law to foreign nationals or even to American citizens overseas.

Act that all endangered and threatened species receive the same degree of protection under Section 7 from thoughtless federal agency actions that may exterminate them from the earth.

CONCLUSION

For all of the reasons stated above, this Court should deny the Secretary's petition for a writ of certiorari.

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Respectfully submitted,

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